

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DENNIS BIANCO	:	DETERMINATION
	:	DTA NO. 817245
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 1990 through 1997.	:	

Petitioner, Dennis Bianco, 1469 Lexington Avenue, New York, New York 10128-2525, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1990 through 1997.

On January 11, 2000 and January 19, 2000, petitioner, appearing pro se, and the Division of Taxation by Barbara G. Billet, Esq. (Christina L. Seifert, Esq., of counsel), respectively, waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by June 16, 2000, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

I. Whether the Division of Taxation's Bureau of Conciliation and Mediation Services correctly denied petitioner's request for a conciliation conference on the basis that such request was not filed in a timely manner.

II. Whether petitioner has carried his burden of proving that the notice and demand issued by the Division of Taxation should not be upheld.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, Dennis Bianco, 1469 Lexington Avenue, New York, New York 10128-2525, seven notices of deficiency dated January 11, 1999, identified by Assessment ID Nos. L015476459, L015476460, L015476461, L015476463, L015476467, L015476472 and L015518586 and certified mail control numbers P 911 004 694, P 911 004 695, P 911 004 696, P 911 004 697, P 911 004 698, P 911 004 699, and P 911 004 700, asserting personal income tax due for the tax years 1990 through 1996, in the following amounts:

Assessment No.	Tax	Interest	Penalty	Total Amount Due
L015476459	\$936.00	\$131.27	\$477.30	\$1,544.57
L015476460	334.00	77.70	326.53	738.23
L015476461	868.00	381.78	762.42	2,012.20
L015476463	239.00	150.78	240.23	630.01
L015476467	3,858.00	2,040.40	3,350.02	9,248.42
L015476472	1,439.00	1,120.42	1,664.24	4,223.66
L015518586	2,812.00	949.11	1,511.28	5,272.39

The notices of deficiency are addressed to “1469 Lexington Ave, New York, NY 10128-2525.”

The notices of deficiency state that “You must file a Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 04/11/99.” Each notice then states, in part, “[i]f we do not receive a response to this notice by 04/11/99: This notice will become an assessment subject to collection action.”

2. The Division also issued to petitioner a Notice and Demand for Payment of Tax Due dated December 21, 1998, which petitioner protested. It was identified by Assessment ID No.

L015949241 and asserted personal income tax due for the tax year 1997 in the amount of \$1,665.00, plus interest and penalty of \$81.77 and \$151.89, respectively, for a total amount due of \$1,898.66. It was issued as a result of petitioner's filing of his 1997 New York State personal income tax return without remittance of the tax as set forth on the return.

3. Petitioner made a request for a conciliation conference concerning the seven notices of deficiency and the notice and demand on April 13, 1999.

4. A Conciliation Order Dismissing Request, dated May 7, 1999, was issued by the Bureau of Conciliation and Mediation Services ("BCMS") bearing the following explanation:

The Tax Law requires that a request be filed within 90 Days from the date of the statutory notice. Since the notices were issued on December 21, 1998 and January 11, 1999, but the request was not mailed until April 13, 1999, or in excess of 90 days, the request is late filed.

A timely petition was filed by petitioner with the Division of Tax Appeals in protest of the Order on August 2, 1998.

5. Concerning the notices of deficiency, the Division submitted the affidavits of Geraldine Mahon, Principal Clerk of the Case and Resource Tracking System (hereinafter "CARTS") Control Unit of the Division since 1989, whose duties include supervising the processing of notices of deficiency and determination prior to sending the notices to the Division's mechanical section for mailing, and James Baisley, Chief Mail Processing Clerk, Mail Processing Center of the Division since 1994, whose duties include supervising the staff responsible for the delivery of outgoing mail to the post office. These affidavits describe the general procedures for the preparation and mailing of the notices of deficiency, and describe how such procedures were followed in this case.

6. The general process for issuing and mailing notices of deficiency begins with the CARTS Control Unit's receiving a computer printout entitled "Assessments Receivable, Certified Record for Zip +4 Minimum Discount Mail," referred to as a Certified Mail Record ("CMR"), and the corresponding notices of deficiency. The CMR is printed approximately ten days prior to mailing to allow time for review and processing and, therefore, the date on the CMR usually has to be changed to coincide with the date the notices are mailed. The notices themselves, on the other hand, are printed with the anticipated date of mailing. A certified control number is assigned to each notice, recorded on the notice itself and listed on the CMR under the heading "CERTIFIED NO."

A Division employee places each notice in an envelope. Once the notices are placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. Then a mail processing clerk checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. A random review of 30 or fewer pieces of certified mail is checked against the information on the CMR. At some point in this process an employee of the Mail Processing Center manually changes the date on the CMR (which reflects the date it was printed) to the date of delivery to the post office. An employee of the Mail Processing Center then delivers the envelopes and the CMR to one of the various branch offices of the United States Postal Service ("USPS") located in the Albany, New York area. A USPS employee affixes a postmark and initials or a signature to the CMR indicating receipt of the mail listed on the certified mail record and of the CMR itself. The employee of the Mail Processing Center also requests the USPS to either write in the number of pieces received at the post office in the

space provided or, alternatively, to circle the number for the pieces listed to indicate that was the number of pieces received.

The Division does not in the normal course of business request return receipts. Therefore, the CMR is the Division's receipt for certified mail delivered to the post office. It is usually picked up from the post office the following day by an employee of the Mail Processing Center and returned to the CARTS Control Unit. In cases of multi-page CMRs, the pages are connected when delivered to the USPS and remain connected even after being delivered back to the CARTS Control Unit, unless the Principal Clerk of the unit requests that the pages be disconnected.

7. In support of its position that the procedures outlined in Finding of Fact “6”, were followed in this case, the Division has also submitted a copy of the CMR listing the notices at issue in this matter. The CMR consists of 28 pages with 11 entries on each page, with the exception of page 28 which bears 5 entries. It shows a printed date of “12/31/98” on each of the 28 pages. On page one the printed date has a line through it and above it is handwritten the date of “1-11-99.” There is a consecutive listing of 302 certified control numbers beginning with P 911 004 623 and ending with P 911 004 924. On the last page next to “TOTAL PIECES AND AMOUNTS LISTED” appears the printed number 302, which is circled. There is no amount next to “TOTAL PIECES RECEIVED AT POST OFFICE.” There is a USPS postmark of January 11, 1999 on each of the 28 pages and initials under the number “302.”

Petitioner’s name is listed on pages 7 and 8 of the CMR. The certified numbers listed for the notices sent to petitioner are P 911 004 694 through P 911 004 700, which match the certified numbers shown at the top of the correspondence which accompanied petitioner’s seven notices of deficiency. The notice numbers listed on the CMR for petitioner’s notices are

L 015476459, L 015476460, L 015476461, L 015476463, L 015476467, L 015476472, and L 015518586, which match the numbers appearing on the notices of deficiency. The name and address of petitioner is listed next and also corresponds to the information set forth on petitioner's notices. There is a USPS postmark of January 11, 1999 on pages 7 and 8 of the CMR.

8. The Division submitted as part of the record a copy of petitioner's resident income tax return for 1997, Form IT-201, which shows total New York State tax computed to be \$1,665.00.

SUMMARY OF THE PARTIES' POSITIONS

9. Petitioner, appearing pro se, submitted his petition admitting to the late filed request for a conciliation conference. He stated he had trouble meeting his financial obligations, but that he attempted to satisfy his tax obligations, and now requests reconsideration of his protest.

10. The Division simply argues that petitioner did not meet his burden of proof to show that his protest of the notices was timely.

CONCLUSIONS OF LAW

A. Tax Law § 681(a) authorizes the Division of Taxation to issue a Notice of Deficiency to a taxpayer where the Division determines that there is a deficiency of income tax. This section further provides that such a notice "shall be mailed by certified or registered mail to the taxpayer at his last known address." The statute does not require actual receipt by the taxpayer. Where the Division establishes that its statutory notice of deficiency has been properly issued, that is sent by certified or registered mail to the taxpayer's last known address, the notice is valid and sufficient whether or not actually received. (*See, Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990; *Matter of Kenning v. State Tax Commn.*, 72 Misc 2d 929, 339

NYS2d 793, *affd* 43 AD2d 815, 350 NYS2d 1017, *appeal dismissed* 34 NY2d 667, 355 NYS2d 1028; *compare, Matter of Ruggerite, Inc. v. State Tax Commn.*, 97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517.) If the notice is properly mailed, the statute places risk of nondelivery on the taxpayer (*see, Matter of Malpica, supra*).

B. In response to a notice of deficiency, a taxpayer may file a petition with the Division of Tax Appeals seeking redetermination of the deficiency or, alternatively, may request a conciliation conference with the BCMS, within 90 days of the mailing of the notice of deficiency (Tax Law § 689[b]; § 170[3-a][a]; *see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). Where a taxpayer fails to file a timely protest, the Division of Tax Appeals has no jurisdiction to decide the merits of a notice of deficiency (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

C. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the mailing of the notice. As noted above, under Tax Law Article 22, where the Division establishes that it has properly mailed a notice, as required, the only remaining question is whether petitioner timely responded in protest thereto. It is well settled that the Division bears the burden of proving proper mailing of a notice (*Matter of Katz, supra*). The Division may meet this burden by providing evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

The required proof of mailing is two-fold: first, there must be proof of the Division's standard procedure for issuance of notices, provided by individuals with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question. The Division submitted the affidavits of Ms. Mahon and

Mr. Baisley in support of its position that the notices of deficiency were issued to petitioner on January 11, 1999, and such affidavits contain sufficient proof to establish the standard procedure of the Division for issuing such notices (*see, Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). The affidavits show that, as each notice is generated, a certified control number is assigned to each. In the process, a certified mail record is generated which contains the name and address of the taxpayer to whom the notices were issued, the assessment number of the notices and the certified control number assigned to the notices.

Second, the Division established that the general issuance procedure was followed on January 11, 1999 in the generation and mailing of petitioner's notices dated that day. Specifically, the affidavits of Ms. Mahon and Mr. Baisley, together with the certified mail record, show the total number of pieces received by the USPS, and the postmarks on the CMR, in turn, show the date of mailing as January 11, 1999 (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995). It is observed that the CMR used by the Division contains most of the significant elements of Postal Service Form 3877, and serves the same purposes of establishing the Postal Service receipt of the items listed thereon. The Division is not required to produce employees who personally recall the mailing of each notice. Rather, evidence of the Division's standard mailing procedure corroborated by documentary evidence of actual mailing is sufficient.

Finally, it is noted that the figure "302" on the last page of the January 11, 1999 CMR, signifying the total number of pieces of mail listed, has been circled and a Postal Service employee has signed in the vicinity of the figure. As in *Matter of Roland (supra)*, the Postal Service employee circled this figure to indicate the number of pieces of mail received by the USPS on January 11, 1999. In addition, and unlike the situation in *Roland*, the affiant (here

Mr. Baisley) also states the basis of his knowledge for this proposition. The Division's Mail Processing Center specifically requested that postal employees indicate the total number of pieces received by the USPS by either circling the number or writing the number on the certified mail record. This additional fact provides the element found to be lacking in ***Roland***. Accordingly, consistent with the reasoning in ***Roland***, the Division has met its burden of proof on the question of actual mailing in this case as to the notices of deficiency.

Petitioner does not challenge the method of mailing the notices of deficiency, nor does he dispute their receipt. Although petitioner attempted to claim poverty to renew his ability to have the notices reviewed, the proof of mailing and delivery submitted by the Division proves that proper mailing procedures were in fact followed in this case. Petitioner's statement is not sufficient to rebut the fact that the notices of deficiency were properly mailed and petitioner was required to file his request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals within 90 days of January 11, 1999, or no later than April 12, 1999. Since the request was not made until April 13, 1999, it is time barred. Accordingly, the notices of deficiency are upheld.

D. The Notice and Demand mailed to petitioner in this matter was issued pursuant to Tax Law § 692(b), which requires the Division to give notice as soon as practicable to a person liable for tax, penalty or interest which has been assessed but not paid. Since petitioner filed his 1997 return without remitting the tax, the Division properly issued the Notice and Demand. Petitioner appropriately exercised his right to petition the Notice and Demand (*see, Donal A. Meyers v. Tax Appeals Tribunal*, 201 AD2d 185, 615 NYS2d 90; *lv denied* 84 NY2d 810, 621 NYS2d 519), and the Conciliation Order stating that its protest was time barred was in error. Thus, as to the Notice and Demand, there is no issue of the timeliness of filing a protest.

Accordingly, the Division is not required to prove its mailing as it must with the notices of deficiency (*see*, Conclusion of Law “C”). However, petitioner’s protest does require him to carry the burden of proving why he should not have to pay the notice and demand, which was based on self-assessed tax (Tax Law § 689[e]). Since petitioner’s only explanation was his inability to meet his financial obligations, and he offered no further evidence to prove the Notice and Demand should fail, petitioner does not prevail on the merits.

E. The petition of Dennis Bianco is hereby dismissed with respect to the Notices of Deficiency identified by Assessment ID Nos. L015476459, L015476460, L015476461, L015476463, L015476467, L015476472 and L015518586, all of which are dated January 11, 1999, and the petition is denied with respect to the Notice and Demand identified by Assessment ID No. L015949241, dated December 21, 1998.

DATED: Troy, New York
September 28, 2000

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE